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No. 92-758

In the Supreme Court of the United States

OCTOBER TERM, 1992

PATRICIA A. CAMPBELL AND
THOMAS CAMPBELL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the failure to recognize a cause of action in tort for wrongful birth violates a woman's right to elect an abortion under the Due Process Clause of the Fifth or Fourteenth Amendment to the Constitution.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-18a, is reported at 962 F.2d 1579. The opinion of the district court, Pet. App. 21a-28a, is reported at 795 F. Supp. 1127.

JURISDICTION

The judgment of the court of appeals was entered June 15, 1992. A petition for rehearing was denied August 20, 1992. The petition for a writ of certiorari was filed on October 30, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners, Patricia and Thomas Campbell, are the parents of Jennifer Campbell, a mentally retarded and physically impaired child. Jennifer's impairment is allegedly due to a chromosomal defect. Petitioners allege that a doctor employed by the United States Army Health Clinic at Fort McPherson, Georgia, failed to diagnose Patricia Campbell's pregnancy. Petitioners allege further that, had they timely learned of the pregnancy, they would have obtained an amniocentesis examination; would have learned of the chromosomal deficiency that caused Jennifer's impairment; and would have obtained an abortion that would have prevented Jennifer's birth. Pet. App. 2a-3a, 21a-22a.

2. Petitioners brought this action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.* Petitioners invoked two related tort theories. One theory was a "wrongful birth" theory, under which petitioners sought damages "for medical expenses associated with the pregnancy and delivery, and for the special expenses of raising an abnormal child, including medical care and special education." Pet. App. 22a. The other was a "wrongful life" theory, under which they sought damages "on behalf of Jennifer Campbell for emotional pain, suffering, anxiety and humiliation." *Id.* at 23a.[1]

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[1] The Georgia Supreme Court distinguishes between "wrongful birth" and "wrongful life" actions as follows:

> "Wrongful birth" and "wrongful life" actions are both species of malpractice claims wherein relief is sought for allegedly negligent or intentional treatment or advice that has deprived the parents of the opportunity to abort a fetus and thereby avoid the birth of an impaired child. An action for "wrongful life" is brought on behalf of an impaired child and alleges basically that, but for the treatment or advice provided by the defendant to its parents, the child would never have

The United States has waived sovereign immunity under the FTCA only to the extent to which "a private person[] would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b); see also 28 U.S.C. 2674. The Georgia Supreme Court has held that, under Georgia law, there is no cause of action for "wrongful birth." *Atlanta Obstetrics & Gynecology Group* v. *Abelson*, 398 S.E.2d 557, 563 (Ga. 1990).[2] Accordingly, the district court granted the government's motion to dismiss plaintiffs' complaint for failure to state a claim upon which relief could be granted. Pet. App. 28a.

3. Petitioners appealed only from that portion of the judgment denying their claim for "wrongful birth," arguing that "what the Georgia Supreme Court has done is unconstitutionally alter its tort remedies so as to deprive female citizens of the United States residing in Georgia of any remedy for the deprivation of their right of free choice regarding whether to abort a defective fetus or to carry it to term." Appellant's C.A. Br. 39. Petitioners concluded that "the federal courts should not, in

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> been born. An action for "wrongful birth" is brought by the parents of an impaired child and alleges basically that, but for the treatment or advice provided by the defendant, the parents would have aborted the fetus, thereby preventing the birth of the child.

Atlanta Obstetrics & Gynecology Group v. *Abelson*, 398 S.E.2d 557, 559 (Ga. 1990), *quoted at* Pet. App. 23a-24a.

[2] Georgia is one of seven states that currently do not recognize damage claims for wrongful birth, either by statute or case law. See *Azzolino* v. *Dingfelder*, 337 S.E.2d 528 (N.C.), cert. denied, 479 U.S. 835 (1986); *Wilson* v. *Kuenzi*, 751 F.2d 741 (Mo.), cert. denied, 488 U.S. 893 (1986); Idaho Code § 5-334 (Supp. 1986); Minn. Stat. § 145.424 (1987 Supp.); Mo. Ann. Stat. § 188.310 (Vernon Supp. 1987); S.D. Codified Laws Ann. § 21-55-2 (Supp. 1986); Utah Code Ann. § 78-11-24 (1986 Supp.).

the face of an obvious deprivation of constitutionally guaranteed liberties, recognize state tort law as binding upon the outcome, when to do so would perpetuate the denial of those constitutional rights by the federal court itself." *Ibid.* The panel ruled that petitioners' constitutional challenge lacked merit.

a. A majority of the court concluded that petitioners were arguing that "Georgia's nonrecognition of wrongful birth violates the due process and equal protection rights of the plaintiffs and compels the creation of a wrongful birth cause of action," Pet. App. 6a n.3, and concluded that Georgia's failure to recognize a cause of action against a private party for wrongful birth did not violate the Fourteenth Amendment. Relying on *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 160 n.10 (1978), the majority held that the Fourteenth Amendment is limited to state action, and applies to the actions of private parties only if they act with state encouragement or coercion. Reasoning that the mere absence of laws regulating private conduct "does not coerce or compel private parties to violate women's rights," Pet. App. 10a, the majority concluded that "a Georgia statute that does not provide recovery for private conduct is not state action" and therefore does not violate the Fourteenth Amendment, *ibid.*; *id.* at 10a-12a.

b. Judge Anderson concurred. He believed that Georgia's decision not to recognize a wrongful birth cause of action did involve state action. Pet. App. 13a. Nonetheless, he rejected petitioners' constitutional claims on their merits. He concluded that Georgia law, considered as a whole, does not impose an undue burden on a woman's right to choose an abortion and therefore does not violate the Due Process Clause. *Id.* at 13a-18a.

ARGUMENT

Petitioners challenge the lower courts' rulings that they cannot recover under Georgia law for their claim of wrongful birth. There is no conflict among the circuits on the question presented by this case. To our knowledge, neither this Court nor any other court of appeals has considered whether the failure to recognize a cause of action in tort for wrongful birth violates a woman's right to elect an abortion under the Fifth or Fourteenth Amendment to the Constitution. In addition, petitioners' claims lack merit. Thus, there is no reason for review by this Court.

1. a. "[T]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States." *Shelley* v. *Kraemer*, 334 U.S. 1, 13 (1948). As the majority noted, "private conduct may be treated as state action for purposes of the Fourteenth Amendment if the conduct has received the imprimatur of the state." Pet. App. 7a. This Court has held that "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement * * * that the choice must in law be deemed to be that of the State." *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982). While state law does sometimes provide remedies for private wrongs, the Court has explained that:

> It would intolerably broaden, beyond the scope of any of our previous cases, the notion of state action under the Fourteenth Amendment to hold that the mere existence of a body of property law in a State, whether decisional or statutory, itself amounted to "state action" even though no process or state

officials were ever involved in enforcing that body of law.

Flagg Bros., Inc. v. *Brooks*, 436 U.S. at 160 n.10. Those decisions support the judgment below. The cause of petitioners' injury is the failure of a physician correctly to diagnose Mrs. Campbell's pregnancy. Georgia's case law, which does not recognize a remedy under tort law for wrongful birth, neither encourages, authorizes, nor coerces such behavior. Thus, there is no state action at issue here for purposes of the Fourteenth Amendment.

b. Relying on cases as *Mathews* v. *Lucas*, 427 U.S. 495 (1976), and *Thomas* v. *Sullivan*, 922 F.2d 132 (2d Cir. 1990), petitioners argue that a court should "adjudicate[] [constitutional] attacks on the underlying state law * * * under the Fifth, *not* the Fourteenth, Amendment." Pet. 7-8. They contend that the choice between the Fifth or Fourteenth Amendment is significant since, in their view, the Fifth Amendment contains no parallel to "the 'state action' requirement under the Fourteenth Amendment." Pet. 10.

Although petitioners assume that the Fifth Amendment controls their claims, the lower courts understood that petitioners argued that the Georgia tort law violated the Constitution and that the FTCA should incorporate Georgia law only insofar as it is constitutional.[3]

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[3] In this Court, petitioners characterize their case differently than they did in the lower courts, now contending that the case was brought as an "attack * * * on a Federal provision setting rights and liabilities." Pet. 8. By contrast, in the lower courts, petitioners characterized their attack as one challenging "the Georgia Supreme Court [because it] unconstitutionally alter[ed] its tort remedies so as to deprive female citizens [of their constitutional rights] regarding whether to abort a defective fetus or to carry it to term." Appellants' C.A. Br. 39. That characterization provides a more than rational basis for the lower courts to have concluded that petitioners' claims concern primarily the constitutionality of

The Fourteenth Amendment, not the Fifth Amendment, restrains the States, so it is natural that the courts below evaluated petitioners' claims under the Fourteenth Amendment.[4]

c. Relying on *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969), petitioners claim that "[i]f judicial intrusion into religious issues is state action sufficient for the *Presbyterian* case, then judicial hostility to abortion rights in tort cases should also be sufficient state action." Pet. 9. But that case did not discuss the issue of state action. *Presbyterian Church* involved First Amendment restraints on an award by a state civil court of "church property on the basis of the interpretation and significance the civil court assigns to

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the state-law rule of decision. In any event, whether the courts below correctly understood the focus of petitioners' claim is not an issue worthy of review on certiorari.

[4] *Mathews* v. *Lucas*, 427 U.S. 495 (1976), on which petitioners rely, is not to the contrary. That case involved a constitutional challenge to a section of the Social Security Act providing for the distribution of survivor's benefits to children only if, under state laws "applied in determining the devolution of intestate personal property," the children were classified as legitimate or illegitimate. 427 U.S. at 498 n.1 (citation omitted). *Lucas* did not involve a constitutional challenge to state laws creating such classifications. Thus, because the target of the challenge was federal law, it was necessary and appropriate to evaluate the challenge under the Fifth Amendment. In any event, characterizing the claim as resting on the Fifth rather than the Fourteenth Amendment would not change the nature of the issue. Cf. *Martinez* v. *California*, 444 U.S. 277, 281 (1980) (state law immunizing from tort liability public employees who make parole-release determinations "cannot be characterized as state action depriving a person of life"). Indeed, the state action requirement of the Fourteenth Amendment would be virtually meaningless if all private persons in the United States were bound to comply with the parallel obligations imposed by the Fifth Amendment on the federal government.

aspects of church doctrine." 393 U.S. at 441. There, unlike here, Georgia courts resolved a dispute about property, according to state law, between private parties. That type of state action is absent here.[5]

2. a. In any event, petitioners' due process claim lacks merit. In *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 112 S. Ct. 2791 (1992), a plurality of this Court concluded that the constitutional right to an abortion is in some respects fundamental, and in some respects not. The plurality said that strict scrutiny review applies only to state regulation of abortion whose "purpose or effect [is to place] a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." 112 S. Ct. at 2820. State regulation that does not place an "undue burden" on a woman's choice is valid if it is rationally related to a legitimate state interest.

Georgia's failure to recognize a cause of action in tort for wrongful birth satisfies this standard. As the concurrence noted, "Georgia's refusal to recognize a cause of action for wrongful birth does not place a significant burden on a woman's right to decide whether to terminate a pregnancy." Pet. App. 15a. This is because Georgia's law does not "actively interfere[] with a woman's abortion decision." *Id.* at 16a. The mere failure to recognize a cause of action in tort "does not * * * *require* a doctor to deviate from ordinary practice in advising

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[5] There also is no foundation for petitioners' claim that the Georgia Supreme Court declined to recognize a wrongful birth cause of action because of that court's hostility toward abortion. The Georgia Supreme Court explained that the question whether to create such a tort was better suited to legislative than judicial resolution because "the legislature offers a forum wherein all of the issues, policy considerations and long range consequences involved in recognition of the novel concept of a 'wrongful birth' cause of action can be thoroughly and openly debated and ultimately decided." *Abelson*, 398 S.E.2d at 563.

pregnant women," *id.* at 17a; rather, Georgia's law merely does not provide one form of deterrent—potential tort liability—that it is possible for a State to impose. Physicians are still restrained by their "ethical and professional duty to give full information and advice regarding matters crucial to an informed medical decision," *ibid.*, and if physicians improperly withhold such information, they run "the risk of having Georgia's Board of Medical Examiners determine that the doctor's deficient performance merits suspension or revocation of the doctor's medical license," *id.* at 17a-18a. A physician also cannot escape suspension or revocation of his license through the use of insurance. Accordingly, the concurrence correctly concluded that petitioners have "[a]t most * * * raise[d] a speculative fear that removing the threat of medical malpractice liability will, in some cases, result in women receiving less information with respect to their abortion decisions." *Id.* at 17a. Bare speculation cannot establish the existence of an undue burden. Cf. *Casey*, 112 S. Ct. at 2832-2833 (plurality opinion).

b. Petitioners maintain that it is "irrelevant" that Georgia law does not constitute an undue burden on the rights of all women. Pet. 16. They contend that there is an undue burden every time any woman is "wrongfully denied the information necessary to even have reason to consider whether to exercise the right to an abortion." *Ibid.* That analysis is mistaken. Petitioners must show not just that a physician's negligence has burdened their ability to choose to terminate a pregnancy; they must demonstrate that the failure of the government to provide them with a tort law cause of action encouraged physicians' negligent behavior, which in turn burdened their ability to choose to terminate a pregnancy. They have not done so.

Because Georgia's failure to recognize a cause of action for wrongful birth imposes no undue burden, it need only be rationally connected to legitimate state purposes to be upheld. Georgia law satisfies that standard. The Georgia Supreme Court explained that a wrongful birth was not easily classified as a normal tort as to causation and the calculation of damages. The court also pointed out that jurisdictions that have recognized a wrongful birth tort have not been able or willing to adopt the traditional damages rule that tortfeasors are responsible for the foreseeable consequences of their negligent acts. *Abelson*, 398 S.E.2d at 561. For example, some courts have allowed parents to recover only extraordinary expenses of child rearing, not the ordinary child-rearing expenses. *Id.* at 561-562. Finally, recognizing a wrongful birth tort would require a court to resolve various other difficult policy questions, such as whether parents can recover damages for expenses that occur after a child reaches the age of majority; whether damages for pain and suffering are available; whether damages should be offset by the benefits accruing to the parents from the fact that they have a child; and whether (and, if so, to what extent) a child's equitable claim on the damages award given to its parents must be recognized in the crafting of the damage award. The Georgia Supreme Court observed that there is nothing resembling a consensus in the jurisdictions recognizing the cause of action, because the cause of action does not fall within, and is hence not cabined by, traditional elements of tort liability. *Id.* at 563.[6] Under these circumstances, it was

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[6] See also Note, *Wrongful Birth Damages: Mandate and Mishandling by Judicial Fiat*, 13 Val. U.L. Rev. 127, 170 (1978) ("It is naive to suggest that * * * a [wrongful birth] situation falls neatly into conventional tort principles, producing neatly calculable damages.").

reasonable for that court to decline to create a novel cause of action and, instead, to leave to the legislature the resolution of a difficult policy question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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